STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2011
v	No. 290692 Marquette Circuit Court
MICHAEL ALLAN APPLETON, Defendant-Appellant.	LC No. 08-045541-FH

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of resisting arrest (resisting and obstructing), MCL 750.81d(1).[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction stemmed from his resisting two police officers who attempted to arrest him at his home pursuant to a warrant. Michigan State Police Trooper Jonah Bonovetz testified that he, Marquette County Sheriff's Department Detective Corporal Scott Johnson, and another detective met with defendant to discuss possible charges and the issuance of a warrant for defendant's arrest. According to Bonovetz, while defendant was initially cooperative and readily allowed the officers to remove a belt knife he had on his person, he became excited and aggressive when the officers wanted to inspect defendant's jacket before he put it on. After defendant became uncooperative, Bonovetz put his hands on defendant's shoulder and his wrist and stated, "Okay, let's go." Defendant pulled away from Bonovetz. Bonovetz grabbed defendant's arm and wrist again and started to take him down to the ground. Bonovetz told defendant to place his hands behind his back, but defendant kept his arms tucked in. Johnson started to assist Bonovetz, and defendant told them, "You guys are going to work for your money. I sure do." The officers stood defendant up and walked him toward the kitchen. Defendant started pulling away and twisting. Bonovetz performed a "leg sweep" and the three

[1] Defendant was charged with one count of resisting and obstructing causing injury, MCL 750.81d(2), and one count of resisting and obstructing. Defendant was convicted of the lesser-included offense pertaining to the first charge and acquitted of the other charge.

again went to the ground as defendant and Johnson tripped. Defendant continued to struggle, and he ignored Bonovetz's orders to place his hands behind his back. Defendant eventually complied after Bonovetz delivered two "knee strikes" to defendant's thigh. The time between the actions of defendant pulling away and Bonovetz cuffing defendant was approximately one and one-half minutes. Bonovetz stated that defendant did not strike Bonovetz or Johnson. However, Bonovetz suffered cuts to two of his fingers on his left hand, and his right knee was red and swollen after the incident. Johnson's testimony was similar to that of Bonovetz.

The defense argued that the arresting officers were aggressors who used excessive force and that defendant, acting under duress, was merely seeking to protect himself from injury rather than to resist or obstruct the arrest. Defendant testified as follows: After he told Bonovetz that he had a knife and reached to give it to him, Bonovetz grabbed him, pinned him, and reached into defendant's pockets. After defendant hugged his son, Bonovetz instructed him to get his coat. As defendant was separating the two layers of his coat because he only wanted to wear the outer shell, Bonovetz grabbed the coat and said "I'll take that." Defendant dropped the liner and said, "I'm not wearing that one." In response, Bonovetz immediately threw defendant to the floor, but defendant was able to stay up, partially on his knees. Defendant was afraid that Bonovetz intended to injure him, and so he crossed his arms in front of his body as he tried to cover himself. Bonovetz told defendant that he was going to put defendant down, and defendant was frightened of what would happen if defendant was "put down." Defendant resisted Bonovetz's attempt to get him to the floor.

Defendant testified that he did not strike or kick the officers and, when asked whether he intended to do so, replied, "The thought never even crossed my mind." Defendant claimed that as he and Bonovetz struggled, Johnson came up behind defendant, put his arm around defendant's neck, started choking him, and said, "Appleton, I'm going to put you out." Defendant stated that he grabbed Johnson's arm, squeezed it, and peeled it away. Later, as defendant was on the ground, with Johnson lying on his shoulder, the officers told him to put his hands behind his back and to stop resisting. Defendant maintained that he refused to do so because he was afraid of being beaten. He stated that while on the floor, he felt two blows to his ribs, he then told the officers, "Please quit and I will do what you want me to," and the officers handcuffed him. Defendant also elicited testimony from a friend who was in the home and who maintained that he heard the officers tell defendant to stop resisting and heard defendant tell the officers that he was not resisting.

Before trial, defense counsel requested jury instructions pertaining to accident,[2] and also pertaining to self-defense, consistent with those found in CJI2d 7.22. At some point, defendant apparently also requested that the trial court provide a duress instruction. The trial court instructed the jury on the elements of resisting and obstructing, including the necessity that the prosecutor prove that defendant's actions were intentional, not accidental. The trial court also provided the following duress instruction:

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[2] See CJI2d 7.3a.

> The defendant says that he is not guilty because someone else's threatening behavior made him act as he did. This is called the defense of "duress." The defendant is not guilty if he committed the crime under duress. Under the law there was duress if five things were true:
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> One, the threatening behavior would have been made (sic) a reasonable person fear death or serious bodily harm;
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> Two, the defendant actually was afraid of death or serious bodily harm;
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> Three, the defendant had this fear at the time he acted;
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> Four, the defendant committed the act to avoid the threatened harm;
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> Five, the situation did not arise because of the defendant's fault or negligence.
>
> In deciding whether duress made the defendant act as he did, think carefully about all the circumstances as shown by the evidence. Think about the nature of any force or threats. Think about the background and character of the person who made the threats or used force. Think about the defendant's situation when he committed the alleged act. Could he have avoided the harm he feared in some other way than by committing the act? Think about how reasonable these other means would have seemed to a person in the defendant's situation at the time of the alleged act.
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> Five [sic], the prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If he fails to do so, then you must find the defendant not guilty.

After the instructions, the trial court asked whether counsel had any objections or requested changes. In addition to other objections not germane to this appeal, defense counsel objected to the failure to provide a specific self-defense instruction in accordance with CJI2d 7.22. The prosecutor responded that the instruction did not fit the facts of the case. The trial court agreed, stating: "All right. I agree with that position. I don't think self-defense is applicable here. I gave you the defense of duress, which I think is applicable. And so I decline to give you the self-defense instruction." The jury found defendant not guilty of the greater offense of resisting and obstructing Bonovetz causing physical injury, but guilty of the lesser offense of resisting and obstructing. The jury acquitted defendant of the resisting and obstructing charge involving Johnson.

On appeal, defendant first argues that the trial court erred when it refused to provide the jury with an instruction on self-defense. We disagree.

We review de novo claims of instructional error. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Likewise, "[w]hether common law affirmative defenses are available for a statutory crime and, if so, where the burden of proof lies are questions of law," which are reviewed de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

> In reviewing claims of error in jury instructions, we examine the instructions in their entirety. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if the instructions are imperfect, there is no error if they fairly represented the issues to be tried and sufficiently protected the defendant's rights. [*People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003) (internal citations and quotation marks omitted).]

Instructional error involving the omission of an element or a defense is subject to harmless-error analysis as a constitutional error. *People v Carines*, 460 Mich 750, 765 n 12; 597 NW2d 130 (1999); see also *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Indeed, structural error that is not subject to harmless-error analysis only occurs when all of the elements of the crime have been omitted. *People v Duncan*, 462 Mich 47, 54-55; 610 NW2d 551 (2000). If a constitutional question was properly preserved for appeal, an error will not require reversal if the prosecution proves beyond a reasonable doubt that the error was harmless. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008).

In the context of the present case, the elements required to establish the resisting-arrest offense were: (1) defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer and (2) defendant knew or had reason to know that the person that defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his duties. MCL 750.81d(1); MCL 750.81d(7)(b); *People v Ventura*, 262 Mich App 370, 377-378; 686 NW2d 748 (2004). "'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

Under the common law and Michigan's earlier resisting arrest statute, MCL 750.479, it was necessary to prove as an element of the offense of resisting arrest that the defendant was subject to a *lawful* arrest. *Ventura*, 262 Mich App at 374; see also *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965), and *People v Eisenberg*, 72 Mich App 106, 111; 249 NW2d 313 (1976). The reason behind this rule was the premise that an unlawful arrest acted as "nothing more than an assault and battery against which the person sought to be restrained may defend himself as he would against any other unlawful intrusion upon his person or liberty." *Eisenberg*, 72 Mich App at 111. However, the Legislature enacted MCL 750.81d on May 9, 2002. After reviewing the language of that statute, and noting that this Court had earlier asked our Supreme Court to revisit the ability of individuals to resist unlawful arrests in light of modern procedural safeguards and the interest of safety to arrestees and officers, see *People v Wess*, 235 Mich App 241, 244 n 1; 597 NW2d 215 (1999), the *Ventura* Court held that because MCL 750.81d does not refer to the lawfulness of an arrest or detaining act, the Legislature affirmatively chose to modify the traditional common-law rule that a person may resist an unlawful arrest. *Ventura*, 262 Mich App at 375-378. Sharing the view that the modern rule promotes safety to the officer and the arrestee, the *Ventura* Court held, "we adopt the modern rule that a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion." *Id*. at 377.

Defendant maintains that notwithstanding *Ventura*, even if the lawfulness of a detaining act is not an element of MCL 750.81d, a defendant may still assert as a defense to prosecution

under that section that he used reasonable force to resist an officer's use of unlawful *force* and, thus, the trial court erred in refusing to instruct the jury on self-defense.

Even assuming, without deciding, that a self-defense instruction is appropriate under certain prosecutions of MCL 750.81d, defendant is not entitled to relief. Such an instruction was not supported by the evidence and was also inconsistent with counsel's closing arguments concerning defendant's defense of duress.

The evidence does not support defendant's claim. The gist of defendant's testimony was not that he used force to defend himself, but instead that he tried to get away and that he refused to comply with the order to put his hands behind his back because he was afraid of being harmed. Bonovetz agreed with the prosecution's characterization that defendant did not "try to hit [the officers] or anything when he was resisting" and also agreed with the prosecutor's further question, "So when you say 'resisting you' you just mean he didn't want to cooperate with the handcuffing?" When the prosecutor asked Johnson if defendant was trying to intentionally injure him, Johnson replied, "I don't know, I guess, I didn't--never thought about if he was trying to injure me. He was definitely not cooperating in trying to get away from being arrested."

In addition, defense counsel focused on duress, not self-defense. Defense counsel requested jury instructions pertaining to accident, and pertaining to self-defense, consistent with those found in CJI2d 7.22, before trial. Later, presumably during the off-the-record conference that took place before closing arguments, defendant apparently also requested that the trial court provide a duress instruction, or the trial court decided that one would be appropriate. Notably, however, defense counsel did not object to the proposed instructions on the record before closing arguments. The prosecution then discussed defendant's duress defense during its initial closing argument. Moreover, defense counsel tailored his argument toward this defense, repeatedly stating that defendant's actions constituted duress and not self-defense. The prosecution again discussed the elements of defendant's duress defense during rebuttal argument.

Under the circumstances, we agree with the trial court's decision regarding the jury instructions. No testimony supported a finding that defendant was attempting to actively harm the officers. Also, an after-the-fact instruction on self-defense likely would have led to juror confusion, given defense counsel's repeated statements during closing argument that defendant was not arguing self-defense.[3]

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[3]The trial court engaged in an off-the-record discussion with counsel concerning the proposed jury instructions before closing argument. However, defense counsel later did not argue that counsel had changed defendant's defense to reflect an earlier decision by the trial court concerning the requested self-defense instruction. During her objection to the instructions as given, counsel stated only that she thought the defense was entitled to a self-defense instruction "along with" the duress instruction. Nor does defendant argue on appeal that counsel's closing argument was tailored to fit an earlier off-the-record decision to deny defendant's request for a self-defense instruction.

Therefore, even were we to find that one could offer self-defense as a defense to resisting and obstructing, the trial court did not err when it refused to provide the instruction in the instant case.

Defendant next argues that the trial court erred when it failed to provide a specific unanimity instruction. We disagree. Defendant did not request a unanimity instruction and did not object to the lack of such an instruction. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id*. at 763-764 (internal citation and quotation marks omitted).

A criminal defendant has a right to a unanimous verdict for conviction. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In most cases, a general unanimity instruction will protect that right. However, a specific unanimity instruction must be given by the trial court if there are alternative acts at issue and "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Cooks*, 446 Mich at 524.

Defendant claims that in this case distinct acts could have supported the resisting and obstructing charge. However, a specific unanimity instruction is not required if the acts were so similar in nature and time that they essentially constituted one continuous transaction. *Id*. at 524, 528-529. That was the case here. With regard to the charges concerning Bonovetz, the prosecutor introduced evidence that, in the space of less than one and one-half minutes, defendant disobeyed more than one order and physically resisted being handcuffed, all in a continuous resistance to his arrest. The evidence regarding defendant's behavior in relation to the officer showed one continuous transaction. We find that the trial court did not clearly err in failing to sua sponte provide a specific unanimity instruction.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher